IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 10, 2004 Session

STATE OF TENNESSEE v. TERRY W. BEAN

Direct Appeal from the Criminal Court for Davidson County
No. 2002-C-1302 Cheryl A. Blackburn, Judge

No. M2003-02062-CCA-R3-CD - Filed October 28, 2004

The appellant, Terry W. Bean, was convicted of vandalism over $1,000, a Class D felony. He was sentenced to two years incarceration in the Tennessee Department of Correction, followed by six years of supervised probation. On appeal, the appellant challenges the sufficiency of the evidence supporting his felony conviction, the amount of restitution imposed, and the denial of his right to testify. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ROBERT W. WEDEMEYER, J., joined.

Amanda McClendon (at trial and on appeal) and Justin Johnson (at trial), Nashville, Tennessee, for the appellant, Terry W. Bean.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Shelli Neal, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In December 2001, Rogan Allen was the general contractor in charge of a $3 million renovation project at the Nashville home of David and Shirley Horowitz. The project included construction of a spiral staircase leading to a fourth floor observatory. Allen employed the appellant as a subcontractor to finish the hardwood flooring. The appellant was to sand the stairs and the hardwood floors of the observatory, apply a coat of stain, and finish with two or three coats of varnish.

On December 3, 2001, Allen and the superintendent of the project, Alvin Hayes, noticed that the floors of the fourth floor observatory had swirl marks around the perimeter of the room. Allen

instructed Hayes to tell the appellant that the floors needed to be made smooth and the swirl marks removed. Later that day, Hayes told the appellant that the observatory floor needed to be redone because it was not satisfactory. Hayes, one of the last people at work, left the job site at approximately 4:30 or 5:00 p.m. When he left, the floors in the observatory room, while bearing swirl marks, were otherwise undamaged. Likewise, the stairs leading to the observatory were unmarred.

At 6:45 a.m. the next morning, Hayes arrived at the job site as the appellant was leaving. Hayes entered the house, and, during his morning "walk-thru," he noticed damage to eighteen of the stairs on the spiral staircase and to the observatory floors. The stairs and the floors bore gouges that were approximately 1/4 inch deep. Accordingly, the floors had to be resanded to remove the gouges and also had to be refinished.

The appellant never again reported to work. Therefore, Allen contracted with Johnny Hunt to repair the damage to the stairs and the observatory floor. Hunt charged $2,357.50 for the repairs and refinishing of the damaged areas.

Detective Bill Cothron investigated the damage and ultimately arrested the appellant. The appellant initially denied any involvement in the crime. However, during the booking process, the appellant said, "I was just mad and it carried over into the next day when I got to work." Detective Cothron opined that the appellant was admitting culpability for damaging "stuff that he had done the work on."

At a bench trial on the charge, the appellant, through counsel, admitted vandalizing the stairs, but he denied that he damaged the observatory floor. Specifically, the appellant conceded that he was guilty of a misdemeanor. The appellant argued, "The extent of the damage, Your Honor, is at issue, and the value or how to appropriately put a value on this." At the conclusion of the proof, the trial court found that the appellant was clearly guilty of vandalizing both the stairs and the observatory floor. Additionally, the court found that the fair market value of the repairs, namely the $2,357.50 Allen paid Hunt for the repairs, was the value of the vandalism. Accordingly, the trial court found the appellant guilty of the Class D felony of vandalism over $1,000. The appellant timely appealed, essentially challenging the sufficiency of the evidence to support his conviction of a felony, the restitution imposed, and the denial of his right to testify. We will address these issues in a different order than that in which they were raised.

II. Analysis

A. Sufficiency of the Evidence

On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no "reasonable trier of fact" could have found the

essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

Tennessee Code Annotated section 39-14-408(a) (2003) provides that "[a]ny person who knowingly causes damage to or the destruction of any real or personal property of another . . . knowing that the person does not have the owner's effective consent is guilty of [vandalism]." "Damage" is defined as "[d]estroying, polluting or contaminating property" or "[t]ampering with property and causing pecuniary loss or substantial inconvenience to the owner or a third person." Id. at (b)(1)(A) and (B). On appeal, the appellant states that his "acts were definitely and admittedly vandalism." We agree. There was substantial proof, including the appellant's limited confession, that he intentionally caused damage to the stairs and the observatory floor. However, the appellant's main complaint is that the trial court improperly determined the value of the damage.

Tennessee Code Annotated section 39-14-408(c)(1) states that "[a]cts of vandalism are to be valued according to the provisions of § 39-11-106(a)(36) and punished as theft under § 39-14-105." Tennessee Code Annotated section 39-11-106(a)(36) (2003) provides:

> (A) Subject to the additional criteria of subdivisions (a)(36)(B)-(D), "value" under this title is:
>
> (i) The fair market value of the property or service at the time and place of the offense; or
>
> (ii) If the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense;
>
> . . . .
>
> (C) If property or service has value that cannot be ascertained by the criteria set forth in subdivisions (a)(36)(A) and (B), the property or service is deemed to have a value of less than fifty dollars ($50.00); and
>
> (D) If the defendant gave consideration for or had a legal interest in the property or service which is the object of the offense, the amount

> of consideration or value of the interest shall be deducted from the value of the property or service ascertained under subdivision (a)(36)(A), (B) or (C) to determine value.

The appellant raises many scattered complaints regarding the trial court's valuation of the vandalism. The appellant argues that the fair market value of the vandalized property could not be determined; therefore, the value of the property should be considered to be less than fifty dollars, rendering the offense a misdemeanor. Intertwined within the foregoing argument, the appellant contends that the trial court refused to credit him for the consideration or legal interest he had in the property or service which is the object of the offense. Specifically, the appellant states, "The Trial Court in this non-jury trial acknowledged at the Motion for New Trial that it was understood that the [appellant] had not been paid for the work he subsequently vandalized. The court erroneously believed that this was an issue of restitution, not value." Further, the appellant explains that he

> finished the wooden steps he had admitted he damaged (as well as had refinished the fourth floor he denies he damaged) without being paid for any of the work. Since the victim never paid [the appellant] to refinish the steps and floor in question (and as a result of the Court ignoring these facts) the General Contractor shall, upon completion of the [appellant] paying restitution, have had the 4th floor and steps leading to the 4th floor refinished for free.

In other words, the appellant claims that he was simply engaging in "self-help repossession."

After careful examination of the record, we conclude that the appellant's argument is flawed. The appellant contends that Allen obtained the benefit of the appellant's services without paying for them, and Allen then obtained the benefit of having the floors redone. However, we conclude that it is of no consequence whether the appellant was paid for his work on the project. Regardless, the record belies the appellant's contention that Allen obtained the benefit of the appellant's services for free. In fact, both Allen and Hayes testified that the floors were not satisfactorily completed and the work would have to be redone to raise the work to a satisfactory level. Allen testified that he paid $2,357.50 to have the stairs and the floors repaired and refinished to a satisfactory level. The trial court, in its role as the trier of fact, determined that $2,357.50 was the value of the property vandalized by the appellant. See State v. Ronald D. Correll, No. 03C01-9809-CC-00318, 1999 WL 812454, at *5 (Tenn. Crim. App. at Knoxville, Oct. 8, 1999). The trial court did not err in so finding. Therefore, we conclude that the evidence is sufficient to support the appellant's conviction for vandalism over $1,000. See State v. Brooks, 909 S.W.2d 854, 859 (Tenn. Crim. App. 1995).

B. Right to Testify

Next, we turn to the appellant's allegation that he was denied the right to testify at trial. It is unquestionable that a criminal defendant has a fundamental, constitutional right to testify at trial. See Momon v. State, 18 S.W.3d 152, 161 (Tenn. 1999). This fundamental right may only be waived

by the defendant himself. Id. "Generally, a right that is fundamental and personal to the defendant may only be waived if there is evidence in the record demonstrating 'an intentional relinquishment or abandonment of a known right or privilege.'" Id. at 161-62. Such waiver may not be presumed by a silent record. Id. at 162.

In Momon, our supreme court outlined procedural safeguards to be employed by the trial court to ensure that a defendant's knowing, voluntary, and intelligent waiver of the right to testify would be reflected on the record. Id. However, because Momon served only to clarify the existing law, "the mere failure to follow these guidelines will not in and of itself support a claim for deprivation of the constitutional right to testify if there is evidence in the record to establish that the right was otherwise personally waived by the defendant." Id. at 163. Our supreme court cautioned that "neither the right to testify discussed [in Momon], nor the procedural protections adopted to preserve that right are new constitutional rules which must be retroactively applied." Id. at 162-63.

The appellant argues that he was denied his right to testify at trial. On appeal, the State concedes that no Momon hearing was conducted to elucidate the appellant's decision to testify. The record reveals that, at the conclusion of the State's case-in-chief, the trial court and the defense engaged in a valuation argument in relation to a motion for judgment of acquittal, as is demonstrated by the following colloquy:

> The Court: All right, [defense], did you have any witnesses or motions?
>
> [The appellant]: Your Honor, I just – I don't think they've proven their proof here. If you look at the statute – I mean, I can see that [the appellant] is guilty of a misdemeanor.
>
> The Court: Okay, well, as I understand it, let me see if I – let's go over this again. [The appellant] is not contesting that he did the vandalism; is that a correct statement?
>
> [The appellant]: [The appellant] is saying he scratched the stairs. That is it. Your Honor.
>
> The Court: Okay, all right, so you are talking about value then?
>
> [The appellant]: Yes, Your Honor.
>
> The Court: Okay, well, then I'll hear your argument about the value.

It is clear from the record that no Momon hearing was conducted, nor was such a hearing requested by the appellant. Furthermore, there is no affirmative showing in the record that the appellant waived his right to testify. Accordingly, the trial court erred in failing to require defense counsel to voir dire the appellant regarding his decision whether to testify. See Momon, 18 S.W.3d at 162.

However, our analysis does not end there. Our supreme court has characterized the denial of the right to testify "as a trial error which is subject to the harmless error doctrine." Id. at 166. In conducting our harmless error analysis on this issue, we are guided by the following factors:

> (1) the importance of the defendant's testimony to the defense case; (2) the cumulative nature of the testimony; (3) the presence or absence of evidence corroborating or contradicting the defendant on material points; [and] (4) the overall strength of the prosecution's case.

Id. at 168. These factors are intended to be "merely instructive and not exclusive considerations" in determining the "actual basis on which the [trier of fact] rested its verdict." Id.; see also State v. Charles Randall Elrod, No. M2001-01125-CCA-R3-CD, 2002 WL 125692, at *3 (Tenn. Crim. App. at Nashville, Jan. 31, 2002) ("Although Momon involved a defendant not testifying at a jury trial, we conclude the Momon requirements also apply to bench trials.").

The appellant attached an affidavit to his motion for new trial, presumably outlining his potential trial testimony. Therein, the appellant averred that on December 3, 2001, he was asked to refinish the floors of the observatory. The appellant refused to refinish the floors, claiming that the only flaw in the floors were "swirl marks which are present in any floor refinishing job from the 'screening' of the floor and cannot be eliminated." Upon his refusal, the appellant was told that he would not be paid until he refinished the floors. The appellant stated that he

> returned to the job site on Tuesday December 4th and scratched the staircase leading to the observatory (that he had refinished to completion but had not been paid for) with his pocket knife. [The appellant] scratched the staircase because it was the only way he could reclaim his product and he did not want Rogan Allen to receive the benefit of his work product for free. [The appellant] did not scratch or do any damage to the 4th floor room.

We note that the appellant raised this issue in his motion for new trial, but he neglected to argue the issue at the hearing on the motion. The trial court, after hearing the limited argument regarding the motion, summarily denied the motion. "Since the trial judge acted as fact-finder in the bench trial, [her] overruling of the motion for new trial was an implicit finding that the [appellant's] testimony would not have affected the outcome of the trial." Elrod, No. M2001-01125-CCA-R3-CD, 2002 WL 125692, at *4.

Our review of the record reveals that during the course of the bench trial, the appellant's counsel repeatedly informed the trial court that the appellant admitted to scratching the stairs, but he denied damaging the observatory floor. Therefore, this information was already before the trial court without the appellant's testimony. The remaining contents of the affidavit are largely cumulative to the testimony received during the bench trial. Moreover, the proof at trial, including the appellant's confession, renders the State's proof against the appellant at trial overwhelming. Accordingly, based upon the proof before us, we conclude that the trial court's error in failing to hold a Momon hearing was harmless.

C. Restitution

Finally, the appellant contends that the trial court erred in imposing an exorbitant amount of restitution. The appellant failed to cite any authority in support of this proposition. Generally, arguments which are unsupported by citations to authority are considered waived. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b). Regardless, we will briefly address the appellant's concerns.

Appellate review of the amount of restitution imposed as part of a sentence and the manner in which the amount was computed is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003); see also State v. Johnson, 968 S.W.2d 883, 884 (Tenn. Crim. App. 1997). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the defendant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, because the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

As we stated earlier, the appellant's complaint regarding his sentence concerns the amount of restitution imposed. "The purpose of restitution is not only to compensate the victim but also to punish and rehabilitate the guilty." State v. Johnson, 968 S.W.2d 883, 885 (Tenn. Crim. App. 1997). Further, the amount of restitution "does not have to equal or mirror the victim's precise pecuniary loss. Moreover, the sum must be reasonable." State v. Smith, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994).

It appears that the trial court ordered the appellant pay restitution as a condition of probation. Tennessee Code Annotated section 40–35-304 (2003) provides:

> (a) A sentencing court may direct a defendant to make restitution to the victim of the offense as a condition of probation.
>
> (b) Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss.
>
> . . . .
>
> (e) For the purposes of this section, "pecuniary loss" means:
>
> (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant. . . .

See also State v. Irick, 861 S.W.2d 375, 376 (Tenn. Crim. App. 1993). Additionally, this court has previously explained that "'special damages'" are "'those which are the actual, but not the necessary result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular sense.'" State v. Lewis, 917 S.W.2d 251, 255 (Tenn. Crim. App. 1995) (quoting Black's Law Dictionary 392 (6th ed. 1990)). Further, "'pecuniary loss'" is "'a loss of money, or of something by which money or something of money value may be acquired.'" Id. (quoting Black's at 1131).

The trial court ordered the appellant to pay $3,082.50 to Rogan Allen. The total included the costs of the repairs made by Johnny Hart, the painting which had to be done as a result of the floor's being repaired, and the extra work which Hayes, acting as superintendent, performed. The court ordered the appellant to pay $150 per month toward his debt, an amount which the appellant admitted in his presentence report that he could pay. We conclude that the trial court did not err in imposing the specified amount of restitution.

III. Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE